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POST-CONFIRMATION TRUST

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen

Plaintiff,

vs.

HAWAII EXPRESS SERVICE, INC., et al.,

Defendants.

) CIVIL NO. CV 03 00385 SOM LEK
) (Copyright)
)
) THE POST-CONFIRMATION TRUST
) FOR THE FLEMING COMPANIES,
) INC.'S MEMORANDUM IN
) RESPONSE TO PLAINTIFF WAYNE
) BERRY'S MOTION *IN LIMINE* TO
) EXCLUDE TESTIMONY OF JACK
) BORJA AND RALPH STUSSI
)

) DATE: January 20, 2006
) TIME: 2:00 p.m.
) JUDGE: Honorable Susan O. Mollway
) Trial Date: January 24, 2006
)

THE POST CONFIRMATION TRUST FOR THE FLEMING
COMPANIES, INC.'S MEMORANDUM IN RESPONSE TO PLAINTIFF
WAYNE BERRY'S MOTION IN LIMINE TO EXCLUDE TESTIMONY
OF JACK BORJA AND RALPH STUSSI

Because the PCT has complied with all applicable rules, there is no basis for this motion. The Court's pretrial order sets January 3, 2006 as the deadline for the filing of witness lists. The PCT timely filed its witness list on that date. Accordingly, the plaintiff provides no basis whatsoever, to strike any witness from the timely filed list.

The case on which the plaintiff relies, Bronk v. Ineichen, 54 F.3d 425, 432 (7th Cir. 1995), is inapposite. In Bronk, the Court prohibited a witness from testifying on rebuttal because "plaintiffs failed to name him on their pre-trial witness list." In contrast, Borja and Stussi were both in fact identified on the defendants' pre-trial witness list filed with the Court on January 3. Because Borja and Stussi were both identified on the witness list, plaintiff's motion should be denied.

Furthermore, the plaintiff can hardly claim "surprise" regarding Mr. Borja and Mr. Stussi being witnesses in this case. Borja is the founder of Atlantic Pacific International, Inc. ("API") and in 1999 he was API's sole

shareholder and Chairman of the Board. In 1999, Stussi was Fleming's Division President for the Hawaii Division. Borja and Stussi were the parties who negotiated the 1999 mutual release and settlement agreement between Fleming and API. Borja and Stussi both testified in the 2003 trial between Fleming and Berry. Plaintiff knows what they will say, as he has heard their testimony numerous times before.

The plaintiff apparently intends to introduce testimony in the instant case regarding the 1999 release and settlement agreement negotiated by Stussi and Borja. If the plaintiff is successful in introducing such testimony (over the PCT's objection) then the jurors should have the opportunity to hear from the parties who actually negotiated the agreement. As a result, the identification of Borja and Stussi is entirely appropriate.

Plaintiff apparently claims that if these witnesses had been identified in defendants' December 5, 2005 Pre-trial Statement, Plaintiff would have deposed them. Although this assertion seems dubious, the PCT has no objection to plaintiff deposing Borja and/or Stussi any time prior to the trial.

Dated: Honolulu, Hawaii, January 10, 2006.

/s/ Thomas H. Yee
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